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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72
	)	
	)	

COMMENTS
OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits these comments on the petition for rulemaking ("the Petition") submitted on December 9, 1997 by the Consumer Federation of America ("CFA"), the International Communications Association ("ICA") and the National Retail Federation ("NRF")(collectively "the Petitioners") regarding the FCC's *First Report and Order*[1] released on May 16, 1997 in the above-captioned proceedings.

I. INTRODUCTION

ACTA is a national trade association with over 220 members including interexchange carriers ("IXCs") and competitive local exchange carriers ("CLECs") providing

[1] *First Report and Order*, In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket No. 92-262, 94-1, 91-213 & 95-72, FCC 97-158 (rel. May 16, 1997), *review pending sub nom. Southwestern Bell Tel. Co. v. FCC*, Nos. 97-2866/2873/2875/3012 (8th Cir.).

telecommunications services on an interstate, international and intrastate basis to the public-at-large. Some of its members also act as underlying (or wholesale) carriers providing network facilities, equipment and services to other member carriers thereby allowing telecommunications services to be resold to the public.

ACTA wholeheartedly supports the Petitioners in their endeavor to secure an access charge regime that is premised on forward-looking costs. ACTA has long argued for meaningful access reform and, once again, strongly urges the Commission to implement rapidly a prescriptive regime based on true cost. In light of the fact that the local monopolies have succeeded in subverting competition in their markets and have attempted to gut the Telecommunications Act of 1996 ("the Act") through court appeals, the Commission has no choice but to institute a rulemaking calling for prescriptive TELRIC-based access charge reform. Furthermore, the Commission must change its habit of violating the Regulatory Flexibility Act by not adequately analyzing the effect of its rules on small businesses. This is not merely ACTA's point of view, but that of the expert agency in charge of advocating small business interests, the Office of Advocacy of the U.S. Small Business Administration ("SBA") as well as the Chairman and Ranking Member of the Senate Small Business Committee. To continue on the present course of compromise, timidity and trepidation will result only in the complete failure of telecommunications competition.

II. ARGUMENT

A. Local Competition Will Germinate Only If Existing Access Charges Are Brought Down to True Cost.

As ACTA has stated before, the Commission erred in relying on the assumption that local competition would bring access charges down to true cost. *See First Report and Order*, ¶ 267. In fact, the opposite is true: local competition will flourish only if new entrants are liberated from the legal obligation of subsidizing their monopolist competitors. Fortunately, the Commission foresaw that relying purely on the market might not fulfill Congress's goal of breaking up the local monopolies when it promised to implement a prescriptive approach to access charges "if competition is not developing sufficiently for our market-based approach to work." *Id.* With the near evisceration of the Commission's implementation of the Act at hand, especially the destruction of the UNE platform option,[2] the time has come for the Commission to make good on its promise to author a prescriptive regime that ends the long-standing practice of implicitly subsidizing the monopolies. In doing so, the Commission should heed its own observation that interstate access charges must be set at the "forward-looking economic cost of providing these services" (*Id.* at ¶ 269; *accord id.* at ¶¶ 43, 44, 274) and that excessive access charges produce "inefficient and undesirable economic behavior" and have "a disruptive effect on competition,

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[2] In relying on its market-based approach, the Commission assumed that local competition would develop through cost-based UNEs. It held that the Act created a "cost-based pricing requirement for incumbent LECs' rates for . . . unbundled network elements, which are sold by carriers to other carriers." *Id.* The Commission also forecast that incumbent local exchange carriers ("ILECs") would promptly develop systems, especially operations support systems ("OSS"), that would allow CLECs to order UNEs in volumes large enough to create vigorous competition. The Eighth Circuit's destruction of the UNE option obliterates the Commission's premise that "interstate access services will ultimately be priced at competitive levels even without direct regulation of those service prices." *Id.* at ¶ 262. Thus, the Commission now has no choice but to adopt its alternative prescriptive regime.

impeding the efficient development of competition in both the local and long-distance markets." *Id.* at ¶ 30. Or, more importantly, "non-cost-based rate structures can . . . threaten the long-term viability of the nation's telephone system." *Id.* at ¶ 165. Accordingly, ACTA enthusiastically supports the Petitioners call for a new rulemaking on access charge reform.

B. The Commission Must Conduct an Adequate Analysis Under the Regulatory Flexibility Act, Unlike What It Did In the *First Report and Order*.

As ACTA argued in its Petition for Expedited Reconsideration in these dockets (filed on July 11, 1997), in the *First Report and Order* the Commission's analysis of the effect of its new access charge rules on small business was woefully inadequate as measured by its statutory duties under the Regulatory Flexibility Act ("RFA") 5 U.S.C. § 601-602.[3] As part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), Congress enacted the Small Business Regulatory Enforcement Act of 1996. This Act amended the RFA to require agencies to make preliminary and then final "regulatory flexibility analyses" on whether an agency's rules have a significant economic effect on a substantial amount of small entities

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[3] The sentiment that the Commission failed to assess in the *First Report and Order* the negative effect its new access rules would have on small businesses (both small carriers as well as small business users) has been echoed by no less than the Office of Advocacy of the U.S. Small Business Administration ("SBA"), the expert agency in charge of advocating the interests of small businesses. *See Ex Parte* Comments and Petition for Reconsideration for Access Charge Reform of the Office of Advocacy of the U.S. Small Business Administration, *et al.*, CC Docket No. 96-262 filed November 21, 1997 ("SBA Comments"). In those comments, the SBA joined ACTA in its call for the Commission to reconsider its *First Report and Order* with a proper RFA analysis.

Additionally, the Chairman and Ranking Member of the U.S. Senate Committee on Small Business have admonished the Commission to adhere to the mandates of the RFA. See Letter to The Honorable William Kennard, Chairman, Federal Communications Commission, from Senator Christopher S. Bond, Chariman, U.S. Senate Committe on Small Business, and Senator John F. Kerry, Ranking Member, November 20, 1997 ("Senate Letter"). "[W]e are troubled by the Commission's failure to analyze the impact of changes to the pricing of interstate access service both on small long distance carriers and on certain small businesses that use long-distance services." *Id.* at 1.

which includes, *inter alia*, small businesses. 5 U.S.C. §§ 601-612; see also Funk, *More Stealth Regulatory Reform*, Administrative & Regulatory Law News, 1-2 (Summer 1996).[4] Under the 1996 amendment, agency compliance with the RFA's requirements was made fully subject to judicial review under the Administrative Procedure Act.[5] In addition to remanding the rule to the agency, a court can also defer enforcement of the rule against small entities "unless the court finds that continued enforcement of the rule is in the public interest." 5 U.S.C. § 611(a)(4)(b); Funk, *supra.*

1. The Tandem Switching Rate Structure Disproportionately Harms Small Carriers and Small Users.

The Commission states in the *First Report & Order's* Final Regulatory Flexibility Act Analysis section that its adoption of a new tandem-switching rate structure should "reduce and minimize uncertainty" for small businesses. *First Report & Order*, ¶ 433. The Commission adds that since the rate structure and rate levels "are more closely related to the costs of providing the underlying services" this should "minimize the economic impact of these rules on small businesses . . . by minimizing the adverse impacts that can accompany non-cost based regulation." *Id.*

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[4] Under the original version of the RFA, agency determinations and analyses under the Act were exempted from judicial review. As a result of this exemption, both agencies and courts widely ignored the Act. *See, generally, Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) and its progeny.

[5] To quote Senators Bond and Kerry, "Congress enacted the SBREFA . . . to ensure that federal agencies do not impose undue regulatory burdens and costs on small businesses. More specifically, SBREFA amended the Reg Flex Act to ensure that federal agencies (I) conduct meaningful initial and final analyses of their rules, and (II) to the extent possible, choose regulatory alternatives that are less burdensome to small business." Senate Letter at 1.

The Commission's analysis fails to recognize the vast and disproportionate cost that will be borne by small carriers as a result of the new tandem switching rate structure. As a result of long-standing Commission policy, small interexchange carriers depend on tandem routing much more than larger carriers. Simple math reveals that the *First Report & Order* will increase tandem switching rates by 400% *after* any "offsetting" access rate reductions. Thus, small carriers will be forced to pass on these higher rates to their customers. Such enormous price increases will exacerbate competitive disadvantages between small and large carriers, and cause a loss of traffic from the tandem-switched option. Such a brutal blow to the competitive IXC community is clearly inconsistent with the pro-competition mandates of the Telecommunications Act of 1996 and the ostensible policies of the Commission itself.

The Commission's new rate structure hurts small businesses further by also failing to meet the goal of cost-based pricing that underscores the Telecommunications Act. The tandem switching rate structure that was up-ended by the *First Report and Order* was a fairly close approximation of the forward-looking costs of tandem switching. However, the new rates bear little relation to actual economic costs as they are based on embedded cost loadings. Direct trunk routing, however, is spared these embedded costs, and, thus, more closely reflects actual costs. Therefore, direct trunk routing will become the more attractive option for consumers to the detriment of smaller carriers that are forced to offer tandem-switched routing due to Commission policy. In short, the Commission's capricious and arbitrary pricing differential between tandem switching and direct trunk routing not only flies in the face of Congress' intent to foster equitable and rationally priced telecommunications competition as embodied in the 1996 Act, it violates the RFA by needlessly harming small businesses as well. ACTA implores the Commission to rectify

this devastating error with new access charge rules. In the alternative, ACTA demands that the Commission at least exercise the honesty and forthrightness called for by the RFA and explain in detail the harm preservation of this rule has on small businesses. *See* SBA Comments at 7 - 10.

2. Destruction of the Unitary Rate Structure Also Disproportionately Harms Small Businesses, Thus Necessitating New Rules.

The current situation is compounded by the Commission's destruction of the unitary rate structure where IXCs are allowed to pay a single per-minute rate for end-to-end tandem-switched transport transmission. Long distance carriers are now forced to purchase tandem-switched transport pursuant to an inflated and irrationally priced partitioned rate structure. Such government mandated artificial pricing greatly increases the cost of tandem-switched transport as carriers now have to pay two sets of fixed charges. Under the new scheme, small IXCs also must pay airline mileage according to the actual routing of the call, no matter how circuitous it may be, as opposed to paying airline mileage between the end-office and the serving wire center. The situation is worsened by the fact that smaller IXCs have no control over how such calls are routed. Once again, since small carriers are the predominant users of tandem-switching, they will be placed at a competitive disadvantage against the likes of AT&T. The Commission must adequately address these disparities under a new and proper RFA analysis.

Small business users, not to mention residential and "home office" users, also will be greatly affected by this new rate structure, particularly rural and suburban customers.[6] Much of rural and suburban long distance service is via tandem-switched transport. The staggering rate

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[6] The Commission should note the observations of Senators Bond and Kerry, "[W]e believe that the Commission should examine the impact that the changes in tandem switching will have on small [users] in rural areas. . . . [With the *First Report and Order*], the Commission is increasing the costs to rural small businesses." Senate Letter at 2.

increase of this service will draw many carriers out of the rural and suburban market leaving fewer choices for these customers. The few carriers that remain may impose pricing structures such as mandatory charges that will significantly increase rates. As a result, the mantra of competition which the Commission espouses, and the 1996 Act emphasizes, greatly suffers, as will consumers.

3. The Commission Must Issue New Rules Reducing the PICC.

The PICC also threatens a vital market segment for small carriers. As discussed *supra*, many small carriers target multi-line businesses as customers. Now, small carriers are faced with a "Catch-22" situation in regard to their options to compensate for the increased costs incurred as a result of the PICC. They are faced with either raising their calling rates or absorbing the higher costs. The former option will surely result in a loss of customers to the larger IXCs who can afford to amortize the PICC over more minutes of use thereby increasing their ability to absorb the costs. If the small carriers attempt to absorb the costs of the PICC, they place in jeopardy their already perilously thin profit margins, and, as a result, many will be forced to go out of business.[7]

Once again, the Commission must examine whether its regulatory approach truly comports with the goals of the Telecommunications Act and the RFA, and determine whether the purported benefits of the approach are actual and real. As implemented by the *First Report and Order*, the multi-line business PICC bears no relation to access costs caused by such customers. Costs caused by multi-line business users are already fully recovered through the multi-line Subscriber

[7] Multi-line business users also will be adversely affected by the PICC, particularly those multi-line businesses with relatively low interstate calling volumes per line (i.e., *small* businesses).

Line Charge ("SLC"). Thus, the PICC is a non-cost-based charge that ends up serving as an implied subsidy to local exchange carriers in defiance of the 1996 Act.[8]

Congress, in enacting the Regulatory Flexibility Act, clearly recognized that small businesses are vital players in a fully functioning competitive market. Congress added teeth to the RFA to ensure that agencies do not merely pay lip service to its language, but, rather, actively ensure that small businesses are not disproportionately affected. *See generally* SBA Comments; *see also* Senate Letter.

C. The Commission Must Comply With the RFA or Risk a Judicial Stay.

In *Thompson v. Clark*, 741 F.2d 401 (1984), the U.S. Court of Appeals for the D.C. Circuit was called upon to apply the earlier version of the RFA and held:

> Thus, if data in the regulatory flexibility analysis -- or data anywhere else in the record -- demonstrates that the rule constitutes such an **unreasonable assessment of social costs and benefits as to be arbitrary and capricious**, 5 U.S.C. § 706(2)(A), **the rule cannot stand.**

Id. at 405 (emphasis added). The D.C. Circuit added:

> **if a defective regulatory flexibility analysis caused an agency to underestimate the harm inflicted upon small business to such a degree that, when adjustment is made for the error that harm clearly outweighs the claimed benefits of the rule, then the rule must be set aside.**

Id. (emphasis added). Accordingly, the Commission must issue new rules that not only eliminate such disparities but issue an order that thoroughly analyzes the rules' effects on small business as mandated by Congress with the RFA or risk a judicial stay.

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[8] *See* 47 U.S.C. § 254(e).

III. CONCLUSION

For the reasons enumerated above, ACTA strongly urges the Commission to adopt new rules. ACTA proposes that the multi-line business PICC be reduced to that of the residential PICC, or $0.53 per line. Furthermore, the Commission should adopt a usage-based charge in a competitively neutral manner to recover any cost-based revenues that may be lost as a result of a reduction in the multi-line business PICC. Lastly, the Commission should mandate the pricing of tandem switching at a standard based on forward-looking economic cost and preserve the unitary rate structure for tandem-switched transport users.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michele Grasse, a secretary in the law office of Helein & Associates, P.C., do hereby state and affirm that copies of the foregoing "Comments of America's Carriers Telecommunication Association" CC Docket Nos. 96-262, 94-1, 91-213 and 95-72 were served via hand delivery this 30th day of January, 1998, on the following:

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